No. 539

SEP 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

In the Matter

of

MANHATTAN STEAM BAKERY, INC.,
Bankrupt,

IRVING J. WHITE, appearing specially,
Petitioner,

IRVING STEINMAN, as Trustee, NATHAN PEARLSTEIN, and MANHATTAN BAKERIES, INC.,
Respondents.

BRIEF OF RESPONDENT-TRUSTEE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HARRY H. SCHUTTE,
Counsel for Respondent,
Irving Steinman,
as Trustee.

LOUIS P. ROSENBERG,
Of Counsel.

THE COURT PRESS, N. Y. C.

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The Circuit Court unanimously affirmed the order of the District Court rendering null and void the petitioner's conditional bill of sale by reason of the failure to comply with the provisions of Section 71 of the Personal Property Law of the State of New York.

The Facts.

The opinion of Judge Augustus N. Hand gives a succinct and accurate statement of the facts, which will not be here repeated.

The Issue.

The record below presented for review the following questions of law:

1. Did the Court have jurisdiction to summarily determine the controversy existing between the parties.

2. Was the conditional sales agreement properly declared invalid as against the trustee in bankruptcy.

No constitutional question is involved, but merely the interpretation of the requirements of the provision of Section 71 of the Personal Property Law of the State of New York.

POINTS.

I.

There is no necessity for a review by this tribunal. No constitutional question is involved and there is no conflict, as is claimed, among any of the circuits on the question here involved.

This case involves merely the application of Section 70(c) of the Bankruptcy Act (11 U. S. C. A., Title 11, §110(c)), which is a continuance of the very same provisions formerly embodied in Section 47 (a)(2) of the Bankruptcy Act as existed prior to September, 1938. Prior to the amendment of the Bankruptcy Act, a trustee could properly question the validity of an instrument for failure to comply with the filing requirements and was vested with all

the rights, remedies and powers of a creditor then holding a lien thereon by legal or equitable proceedings (*In re Active Wet Wash Laundry Co.* (D. C., N. Y.), 8 F. Supp. 966 (affirmed in C. C. A., 2nd Cir.), 73 F. (2d) 990); (*In re Master's Knitting Corp.* (C. C. A., 2nd Cir.), 7 F. (2d) 11; *In re Fairbanks* v. *Wills*, 240 U. S. 642) and that remedy was continued by the amendment of the Bankruptcy Act. The opinion of Judge Hand recognizes this fact, for he says:

> "It is argued that the foregoing provisions of the Chandler Act do not apply because they were enacted in 1938 after the conditional bill of sale was made. They, however, did no more than afford a remedy to a trustee in bankruptcy. We can see no possible basis for a claim that they unlawfully divested property rights. Indeed, the words 'whether or not such creditor actually exists', which were added by section 70(c) of the Chandler Act to section 47(a)(2) (11 U. S. C. A., §75(a)(2)) of the former Bankruptcy Act, as it had stood since the Amendment of 1910, gave the trustee no more than the 'remedies * * * of a creditor holding a lien by legal or equitable process' *which already were open to him under section 47.* In the present case the chattels could have been reached by an execution creditor since the title of the conditional vendor was invalid because the conditional bill of sale was not refiled in accordance with the statute. Accordingly the rights of the trustee as representative of the creditors must prevail over the invalid lien of the conditional vendor. (*In re Active Wet Wash Laundry Co.* (D. C., N. Y.), 8 F. Supp. 966 (affirmed in (C. C. A., 2nd Cir.), 73 F. (2d) 990);

In re Duker Ave. Meat Market (C. C. A., 6th Cir.), 2 F. (2d) 699; *cf. Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268."

There has been no retroactive application of Section 70 (c) of the Bankruptcy Act. The conditional bill of sale was invalid under the previous provisions of Section 47(a)(2) (in *Re Kaufman*, 1 F. Supp. 368) and consequently is not in conflict with *Ginsberg* v. *Lindell*, 107 F. (2d) 721, referred to on page 7 of the petition for writ.

II.

The Court had jurisdiction to summarily determine the issues.

Not alone did the bankrupt have possession of the property at the time of the commencement of the bankruptcy proceedings, but the appellant submitted to the jurisdiction of the Court by making application to reclaim the chattels.

A. The Property Was in the Possession of the Bankrupt at the Time of the Commencement of the Bankruptcy Proceedings and Was Turned Over to the Receiver.

It is well settled that when a bankrupt has possession of the property at the time of the commencement of bankruptcy proceedings, such possession passes to the Court and vests it with jurisdiction to adjudicate in a summary proceeding all controversies and claims in connection therewith (*Isaac* v. *Hobbs Tie & Timber*, 282 U. S. 734; *Lockhart* v. *Garden City Bank & Trust Co.*, 116 F. (2d) 658; *Irving Trust Co.* v. *Fleming*, 73 F. (2d) 423; *In re Weing*, 104 F. (2d) 112).

The chattels were in the possession of the bankrupt at the time of the commencement of bankruptcy proceedings and were turned over to the Receiver in Bankruptcy upon his appointment and qualification. The conditional vendor was aware of this fact and subsequently made application to the District Court for an order modifying the injunctive provisions of its order dated June 3, 1940 so as to permit him to reclaim the chattels and to continue the replevin suit. The Receiver opposed this application and counterclaimed for affirmative relief praying for a decree that the said conditional sales agreement was invalid. The Court had jurisdiction to entertain both applications.

The test is—was the property in the bankrupt's possession at the time of the commencement of bankruptcy proceedings. If it was—jurisdiction was proper and extends to the determination of controversies relating to such property (*In re Tax Service Assn. of Ill.* (U. S. Supreme Court), 59 S. Ct. 131).

B. The Petitioner Invoked the Aid of the Court and Thereby Submitted to the Jurisdiction of the Court.

The petitioner invoked the aid of the District Court and submitted himself to the jurisdiction of that Court for a determination of the question as to whether he was entitled to the lawful possession of the property referred to in his conditional sales agreement. The order of the District Court dated June 3, 1940 appointed the Receiver and stayed all persons from continuing any proceedings which had for its purpose the removal of any of the bankrupt's property. The petitioner, by order to show cause dated June 20, 1940, made application to modify the injunc-

tion and for permission to reclaim the chattels and to continue the replevin action. The Receiver opposed this application and counterclaimed for affirmative relief, praying for a decree that the said conditional sales agreement was invalid. This answer and counterclaim was served upon the petitioner's attorney, who subsequently sought to withdraw his motion to modify the injunction. This request was opposed and facts presented to the Court, demonstrating the vulnerability of the petitioner's lien. The Court thereupon refused to permit the withdrawal and referred the issues to a Referee for determination. This was a proper exercise of the Court's discretion. Rule 41(2) of the Rules of Civil Procedure, effective September 20, 1938, reads:

> "Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deemed proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, *the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court.* * * *"

This rule is applicable to proceedings in bankruptcy. General Order XXXVII promulgated by the United States Supreme Court reads as follows:

> "In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be."

(See *Zydney* v. *New York Credit Men's Association* (C. C. A., 2nd Cir.), 113 F. (2d) 986).

The petitioner's request to withdraw was properly denied where such withdrawal might have deprived the Receiver and trustee of the right to have determined in a summary proceeding the issue of whether or not the lien of the said conditional sales agreement was valid or invalid. In view of the counterclaim, the petitioner had no absolute right to withdraw his application (*In re Palmenberg* (C. C. A., 2nd Cir.), 76 F. (2d) 935; *In re Palmenberg*, 297 U. S. 230, 56 S. Ct. 451).

III.

The conditional sales agreement is invalid as against the trustee in bankruptcy.

The conditional sales agreement was filed on March 12, 1937 and refiled on March 28, 1940. Section 71 of the Personal Property Law of the State of New York provides that such refiling should be *within thirty days next preceding the expiration* of the first filing. Inasmuch as it was not a refiling as required by statute, it was nugatory and rendered said conditional sales agreement null and void as against the trustee in bankruptcy (*In re Kaufman*, 1 F. Supp. 368; *In re Active Wet Wash Laundry*, 87 F. Supp. 966, affd. C. C. A., 2nd Cir., 73 F. (2d) 990; *In re Steffens*, 31 F. (2d) 660; *In re Lukas*, 24 F. (2d) 254). A tardy or premature refiling invalidates the lien as against judgment creditors (*In re Kaufman, supra; In re Active Wet Wash Laundry, supra; In re Steffens, supra; In re Lukas, supra*).

The Receiver in Bankruptcy was in possession of the chattels. The conditional vendor made application to reclaim these chattels. The burden was upon him to establish the validity of the conditional sales agreement. The conditional sales agreement was not properly refiled and the burden was on the conditional vendor to prove that there were no creditors without notice (*In re Master's Knitting Corp.*, 7 F. (2d) 11; *In re Guild, Bloomfield & Jensen, Inc.*, 51 F. (2d) 818). This issue was not raised in the District Court, but for the first time in the Circuit Court. Petitioner neither presented nor offered to adduce proof to establish or support a finding that all creditors knew of the existence of the conditional sales agreement, nor could such fact be established in view of the existence of the many wage and tax claimants who, beyond any question, could not be charged with notice of the existence of the conditional sales agreement.

CONCLUSION.

It is respectfully submitted that the petitioner has shown no reason in law or in fact which would justify this Court in granting his petition for certiorari in this case, and that therefore, the petition should be dismissed.

Respectfully submitted,

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